N. BALASINGAM

v.

SINGAPORE AIRLINES LTD. & ANOR.

HIGH COURT, IPOH
DATO' HJ. ABDUL MALEK B. HJ. AHMAD J.
[CIVIL SUIT NO. 285/1981]
5 OCTOBER 1992

CARRIAGE OF GOODS: By air - Manuscript - Handed to carriers' agent - Evidence showing shipper had sent the manuscript himself - Whether carrier can be made liable for the loss - Non payment of supplementary sum required under Article 22(2)(a) Warsaw Convention - Carriage by Air Act 1974 - Effect on limit of liability of carrier.

CONTRACT: No concluded contract between shipper and carrier - Whether 3rd party can be made liable.

EVIDENCE: Without prejudice communication - Whether admissible - Principles applicable.

According to the plaintiff, he had handed in a manuscript,'The Theory of Flight', to the defendant's agent, declaring its value at RM140,000, to be carried by the third party, as first carriers, to Singapore, and from there, by the defendant. Evidence showed that the manuscript was uplifted from Ipoh on MH 161 on 6 August 1979, for onward transhipment to London.

The defendant's agent agreed that the plaintiff had handed over a parcel to him. But he claimed that after the airway bill had been signed and RM305.17 for insurance premium, and as airfreight and service charges, had been collected, he had told the plaintiff to get the KPW3 form, which was required for exports exceeding RM5,000, from the bank. The plaintiff had then left with the manuscript, later coming back to get the airway bill, claiming that the bank needed to put their stamp on the airway bill to state that KPW3 form had been declared. He was supposed to have returned in the afternoon, but had not done so. The defendant's agent claimed that he did not book the cargo space on the third party's aircraft.

An officer of the third party claimed that the plaintiff had tried to send a parcel by MH 161, an earlier flight, instead of as scheduled, by MH 125, but had been told he could not do so, though the cargo manifest of MH 161 showed that the parcel had been uplifted.

Held:

[1] The defendant was not liable. The manuscript was not sent through the defendant's agent. The plaintiff had sent the manuscript himself.

[2] The third party too was not liable. There was no concluded contract between the plaintiff and the defendant from which the third party could be held liable, and there was no evidence how the cargo was included in the MH 161 manifest.

[3] If, however, the defendant or third party were to be liable, the plaintiff's claim will be governed by the Carriage by Air Act 1974, and he will be entitled to RM96, as there was no evidence that a supplementary sum, as required by the Act if the declared sum is to become payable, had in fact been paid.

[Claim dismissed with costs. Plaintiff to bear costs of third party.]

Cases listed at the end of the judgment:

Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors. [1983] 1 MLJ 213 / [1983] 1 CLJ 191
Rodriguez v. R.J. Parker (Male) [1967] 1 QB 116
Mitchell v. Harris Engineering Co. Ltd. [1967] 2 QB 703
Go Pak Hoong Tractor And Building Construction v. Syk. Pasir Perdana [1982] 1 MLJ 77
Walker v. Wilsher [1889] 23 QBD 335
Lim Tjoen Kong v. A-B Chew Investments Pte. Ltd. [1991] 3 MLJ 4
Wai Wah Enterprises & Eastern Watch Co. Pte. Ltd. v. China Airlines Ltd. [1986] 2 MLJ 269
Swiss Bank Corpn. & Ors. v. Brink's-Mat Ltd. & Ors. [1986] Vol. 2 QB (Com. Ct.) 99
Kulandis/o Muthu v. Subramaniam s/o Velliappan [1983] 1 CLJ 302
Fadzil bin Mohamed Noor v. Universiti Teknologi Malaysia [1981] 2 MLJ 196-199 / [1981] CLJ 85
Wickman Tools v. Schuler [1974] AC 235-263
Shriro (China) Ltd. & Ors. v. Thai Airways International Ltd. 1 MLJ 1967 109-111
Shriro (China) Ltd. & Ors. v. Thai Airways International Ltd. 2 MLJ 1967 91-93
The Borneo Co. Ltd. v. Braathens South American & Anor. [1960] MLJ 201-203
Braathens South American & Anor. v. The Borneo Co. Ltd. [1959] MLJ 253-254
Manufacturers Hanover Trust Co. v. Alitalia Airlines, United States District Court, Southern District of New York, April 1977

Hutton v. Watling & Anor. [1948] 1 All ER 803-806
Thag Services Inc. (M) Sdn. Bhd. v. Capital Insurance Bhd. [1989] 2 CLJ 504-508
Chop Eng Thye Co. v. Malaysia National Insurance Sdn. Bhd. [1977] 1 MLJ 161-166
Elock & Ors. v. Thomson [1949] 2 KB 755-765
Maurice v. Goldsbrough Mort & Co. Ltd. [1939] Privy Council AC 452-467
Bousfield v. Barnes (91815) 4 camp 228
Toronto Railway Co. v. National British and Irish Millers Insurance Co. Ltd. [1914] 111 LT 555-563
Yorkshire Insurance Co. Ltd. v. Thomas Craine [1922] 2 AC Privy Council 541-555
Ayrey v. British Legal and United Provident Assurance Co. [1918] 1 KB 136-143
Hemmings v. Sceptre Life Association Ltd. 1 Ch. 365-370
Supreme QBE Insurance Bhd. v. Foo Yin Toh [1987] 2 CLJ 466-469
Frewin v. Poland [1968] 1 Lloyds Reports 100-103
Burts & Harvey Ltd. and Alchemy Ltd. v. Vulcan Boiler and General Insurance Co. Ltd. [1966] 1 Lloyd's Report 354-355
Berger and Light Diffusers Pty. Ltd. v. Pollock [1973] 2 Lloyd's Report 442-468
Tengku Jaya bin Raja Hassan v. Mohamed bin Zakaria & Anor. [1987] 2 MLJ 97 at 99
Sovereign General Insurance Sdn. Bhd. v. Syk. Keratong Logging Sdn. Bhd. [1976] 2 MLJ 144 at 145
Tang Chok Ching v. Wong Ik Tiang & Ors. [1973] 2 MLJ 25
UMBC Bhd. v. Datuk Sri Chan Swee Ho & Ors. [1978] 1 MLJ 222
Miller, Gibb & Co. v. Smith & Tyrer Ltd. [1917] 2 KB 141
Mildred, Goyenenche & Co. v. Maspons, Y. Hermano [1883] AC Vol. 8, 874
J. Thomas & Co. v. The Bengal Jute Baling Co. Ltd. [1979] AIR CAL 20
Chandran a/l Gopal lwn. Mohammad Razali bin Jaafar [1992] 2 CLJ 785
Lee Ah Chor v. Southern Bank Bhd. [1991] 1 CLJ 667
Muniandy & Anor. v. Muhammad Abdul Kader & Ors. [1989] 2 MLJ 416 / [1989] 2 CLJ 577
Esso Petroleum Co. Ltd. & Anor. v. Southport Corpn. [1955] AER Vol. 3, 864
Hj. Mohamed Dom v. Sakiman [1956] MLJ 45
Noor Jahan Begum v. Abrar Ahmad Khan & Anor. [1982] AIR All 149
Williamson v. Rover Cycle Co. [1901] QB Vol. II 615 [1902] 2 IR 619
Keith Seller v. Lee Kwang Tennakoon v. Lee Kwang [1982] 2 MLJ 191
Tun Datu Haji Mustapha bin Datu Harun v. Tun Datuk Haji Mohamed Adnan Robert [1986] 2 MLJ 420
Air Canada v. Swiss Bank Corp. & Ors. [1987] Aviation Report (IS & B Av R) 287
Bulsing Ltd. v. Joon Seng & Co. [1972] 2 MLJ 43

Other sources listed at the end of judgment:
Ivamy "Fire and Motor Insurance" 4th Edn., p. 164
MacGillivray and Parkington on Insurance Law (1988) 8th Edn. p. 366 Para 364

For the plaintiff - C.K. Leong; M/s. C.K. Leong & Co.; S.A. Almeida; M/s. Almeida & Co.;Madhi; M/s. Madhi Param & Co., Ipoh
For the defendant - Porres Royan; M/s. Shook Lin & Bok
For the third party - Robert Lazar (A. Joyrama with him); M/s. Shearn Delamore & Co.

JUDGMENT

Hj. Abdul Malek b. Hj. Ahmad J:
Despite the early trial ordered on 23 November 1984 for this action which was filed on 5 August 1981, the matter only got off the ground on 16 January 1992. It is first necessary to review the facts of this case.

According to the plaintiff, on 6 August 1979 sometime in the morning, he had gone to the defendant's agent's office at Tatlock Street in Ipoh to airfreight to London a parcel containing a manuscript to Mr. Diwakar Kothakota at No. 34, St. John's Road, Hanworth, Middlesex in England. The parcel was handed over to a Mr. Choong Chee Kheong (DW2) who had checked the contents and had told him to leave it in his custody as he had to show it to Customs for clearance and export. The plaintiff had also told DW2 that he wanted to insure the parcel for RM140,000 which was the value he had placed on his irreplaceable sole manuscript entitled "The Theory of Flight".

DW2 had then typed out the details on the airway bill No. 618-2524172-0 (P1) and had asked the plaintiff to check the details and sign it after which DW2 had also signed it. The route given on P1 is Ipoh-Kuala Lumpur-Singapore-London and the flight numbers stated are for Ipoh to Kuala Lumpur MH125 and from Kuala Lumpur to Singapore SQ113. For Singapore to London, no flight details were recorded.

The declared value for carriage, the declared value for Customs and the amount of insurance had been given as RM140,000 and the amount prepaid by the plaintiff was RM305.17 made up of RM77.17 for the weight charge, RM210 for the carrier and RM18 for the agent. The RM210 is also stated as the charge for the insurance premiums. The value of the goods to

be sent had been described as "Sole Manuscripts For Publications (Irreplaceable) URGENT". DW2 had also filled up the Customs declaration form (ID2) which was signed by the plaintiff.

DW2 had promised the plaintiff that he would take the parcel, airway bill and Customs declaration form to the airport, get Customs clearance and despatch the parcel containing the manuscript safely to London. As requested, the plaintiff had gone back to DW2's office in the evening to get the copies of the two documents which were meant for the shipper.

On 14 August 1979, the plaintiff received a telegram (P3) from Mr. Kothakota stating that he had not received the manuscript. On the next day, he enquired by phone from the defendant's office and when told that the matter would be reverted to him, he wrote a letter (P4) to them on 15 August 1979 as regards this missing manuscript. It is pertinent to note here that the plaintiff had enquired from the defendant and not from their agent with whom he had allegedly left the parcel.

This was followed by the letter from the defendant to the third party dated 16 August 1979 (P5) where para 2 states "the consignment was uplifted from Ipoh on MH161 on 6 August 1979 and for onward transhipment to London ...". The reply from the third party to the defendant was by letter dated 12 November 1979 (P13) where parag 2 reads "We regret to advise that the above assignment is still not traceable. Under such circumstances, our KL cargo office has declared the consignment as lost". A copy of this letter was forwarded to the plaintiff by the defendant on 21 November 1979 (P6). The plaintiff's solicitors wrote to the defendant by letter dated 7 April 1980 (P7) and the defendant's reply dated 16 April 1980 (P8) among other things said "Please convey to your client our sincere regrets for the loss and inconvenience suffered by him. We are investigating the matter and will revert to you in due course".

As for P13, which was not sent to the plaintiff, and other letters marked "without prejudice", learned Counsel for the defendant and for the third party had objected to their production and after considering their submissions and that of learned Counsel for the plaintiff on the matter and studying the letters I had made the following ruling in open court:

(i) from the authorities cited, the legal situation appears to be that a letter marked "without prejudice" does not automatically make it inadmissible in evidence;

(ii) it is for the Court to examine the contents of the said letter to decide whether it should be admitted despite the words "without prejudice";

(iii) despite what learned Counsel for the defendant has submitted, this Court is of the view that there is no proposal contained in the letter at p. 6 of plaintiff's Bundle of Documents and that the said letter only puts the blame on the third party to whom they are referring the plaintiff's claim who are not in any case bound by it;

(iv) in these circumstances, this court will admit pp. 6, 7, 9, and 10 as P9, P10, P11 and P12 respectively;

(v) similarly, Court holds that ID5, ID7 and ID8 are now admitted as P5, P7 and P8 respectively;

(vi) as for ID6 only p. 2 is marked as P6;

(vii) for p. 1 of ID6 and p. 8 of the plaintiff's Bundle of Documents, Court will not admit them but will mark them as ID13 and ID14 respectively and together with ID2 will be admitted only when the maker is called to give evidence.

It is relevant to state at this juncture that ID13 was subsequently marked as P13 when TPW1, the writer, gave evidence.

The first letter in this batch of correspondence is the reply from the defendant dated 21 April 1980 (P9) to the plaintiff's solicitors where paragraph 2 states:

> According to our investigation, the subject cargo was carried by Malaysian Airline System from Ipoh to Kuala Lumpur on 6 August 1979. However, the subject cargo was subsequently lost at Kuala Lumpur and was never transferred to Singapore Airlines for on carriage to London. As MAS would appear to be responsible for the loss, we are referring your claim to the said airline for their attention.

The response from the plaintiff's solicitors is the letter dated 30 April 1980 (P10) where the second paragraph notes that "whilst we note that you have attributed responsibility for the loss to MAS, we would reiterate that you are contractually liable to our client". By letter dated 27 May 1990 (P11), the defendant wrote to the plaintiff's solicitors enclosing a letter

from AIU (S) Pte. Ltd. to the Singapore Aviation & General Insurance Co. (Pte) Ltd. (ID14) which had stated:

> We have perused the documents submitted by you and there is no doubt about it that the cargo was uplifted at Ipoh Airport on board Flight MH161 for Kuala Lumpur on 6 August 1979 and lost them whilst it was still in the care, control and custody of Malaysia Airline System. As such, please advise the claimant lawyers that it is their duty to lodge a claim against MAS, as the first carriers and hold them fully liable for the loss. As a matter of fact, since there was a declaration of value for carriage and the amount of RM140,000 inserted in the Airway bill No. 618-2524172, the carrier shall not be entitled to avail himself under Article 22 of the Warsaw Convention which limit his liability at US20 per kilogram.

The reply from the plaintiff's solicitors to the defendant on 16 June 1980 was quite firm and it is reproduced here for ease of reference:

> THEVIN CHANDRAN SIVA & CHONG
> ADVOCATES & SOLICOTORS
> PEGUAMBELA & PEGUAMCARA
> COMMISSIONERS FOR OATHS
> 13, JALAN KLYNE
> 2nd FLOOR BANGUNAN LIN HO
> KUALA LUMPUR 01-21
> MALAYSIA
> Tel: 201638, 201029
>
> Your reference
> INS CN 390/80
> In Reply Please Quote
> CGN/D/B208-80
>
> 16 June 1980
>
> M/s. Singapore Airlines Ltd.,
> Airline House,
> Singapore International Airport,
> Paya Lebar,
> SINGAPORE 19
>
> Dear Sirs,
>
> re: Cargo Claim -
> AWB 618/25247120
> MH161 IPH/Kul) 6 Aug. 79
> SQ113 KUL/SIN)
>
> Your letter dated 27 May 1980 received by us on 10 June 1980 refers.
>
> We are unable to appreciate your insurers contention that as MAS was the first carrier we should proceed to claim against MAS.
>
> Our client points out that he had sent the parcel through SIA and had been issued a SIA airway bill (AWB). Whatever arrangements SIA may have for reciprocal handling of freight with MAS does not in any way alter the fact that SIA would at all times be responsible to the consignor for any loss.
>
> If as your insurers point out MAS is liable and cannot avail themselves under Article 22 of the Warsaw Convention to limit their liability to US 20 kilogram (RM96) then it follows that MAS has to pay the sum of RM140,000. But in so far as our client is concerned this amount must come from SIA.
>
> Kindly therefore arrange to pay the sum to us immediately: you may thereafter collect the same from MAS.
>
> Yours faithfully,
>
> sgd. THEVIN CHANDRAN SIVA & CHONG
> c.c. client.

That, in brief, was the case for the plaintiff.

Mr. Ooi Kim Seng (DW1), the then senior sales representative of the defendant in Ipoh was called to testify for the defendant and he gave evidence that he had received the complaint of the loss from the plaintiff by phone on 15 August 1979 and he had advised the plaintiff to write in which he did (P4).

From the details given by the plaintiff on the phone after receipt of P4, DW1 had written P5 to the third party. He also stated that he could recall that MH161 left at either 1 or 2 p.m. whereas MH125 left at either 6 or 6.30 p.m. He added that in the situation set out by the plaintiff, the defendant would have to prepare an Aircargo Transfer Manifest similar to D19 to the third party to authorise the latter to accept the carriage as it is recorded on the defendant's airway bill otherwise the third party could refuse to receive the cargo.

DW2, who is now operations manager of Chan Chee Keong & Bros. Travel Sdn. Bhd., had told the Court that on the day in question, he was a clerk in the same firm which was an agent of the defendant. He admitted signing P1 and said that he knew the plaintiff who was also a travel agent and who he had met socially at airline gatherings. He further admitted that P1 was executed in his office after the plaintiff had come alone on 6 August 1979 with an envelope containing hand written documents. The plaintiff had told him that it was a manuscript to be sent to London by air.

DW2 added that he first typed out P1 at the top and subsequently typed all the other details according to the plaintiff's wishes. He clarified that the flight details on P1 were according to the schedule and not according to the plaintiff's instructions. DW2 also explained that he collected RM305.17 from the plaintiff made up RM77.17 for airfreight which was the minimum laid down by the defendant, RM210 for insurance premium at 1.5% of the insurance amount (it was subsequently put to him that the percentage should be 0.15% and not 1.5%) and RM18 for service charge made up of RM3 for the airway bill and RM15 for documentation. He maintained that no prepaid valuation charge was paid as that was an optional amount and if it was paid, the defendant would insure the cargo for value.

Next came the twist to the case. DW2 also gave evidence that seeing that the plaintiff had declared RM140,000 for Customs, he had told the plaintiff to go to the bank to get the KPW3 form which was required for exports exceeding RM5,000 at that time. The bank was to certify that the goods was worth more than RM5,000 in the said form and the form is given to the shipper who will give it to the agent. The agent would then have to type out the Customs declaration form as to the nature of goods, value declared for Customs and the KPW3 form serial number and declaration that the goods were worth more than RM5,000. Without the KPW3 form, he insisted that the cargo could not be sent.

According to DW2, after he and the plaintiff had signed Pl, the plaintiff had left with the envelope containing the documents to get the KPW3 form while DW2 kept Pl. Just before noon, the plaintiff had come back to his office and had told him that the bank needed to see Pl in order to certify that the cargo was being sent off to its destination. He said that the bank needed to put their stamp on Pl to state that the KPW3 form had been declared. Consequently, the plaintiff had taken all the copies of Pl. DW2 had told him to bring all the documents back in the afternoon but the plaintiff never returned.

According to DW2, the shipper could send the manuscript to the airport direct provided he had the Customs documents but DW2 said he would not have agreed to this as the airway bill is an airline document. He denied typing ID2 or bringing it to the airport or making the markings in ink. He observed that there was no KPW3 form number on the Customs declaration. He also said that he did not book the cargo space on the third party's aircraft as he would do so only when the cargo was ready.

The third party has called its Senior Traffic Officer (TPWl) at Ipoh airport who told the Court that in 1979 he was Traffic Officer with the third party at the same airport. He knew the plaintiff personally as he was the third party's travel agent and regular passenger. He also gave evidence that he was on duty on 6 August 1979 and there were five flights going out that day including MH161 at past 1 p.m. His duty was to monitor the progress of the situation and to ensure sufficient manpower to handle equipment. He recalled seeing the plaintiff that day while he was quite busy in the office. The check-in clerk had come to his office to tell him that a shipper had wanted to send a parcel to Kuala Lumpur but that he had no time to attend to him. He had in fact told the shipper that he could not accept the consignment. TPW1 had then gone to attend to the plaintiff who was the said shipper but the plaintiff had told him that he had wanted to send the parcel to London urgently. TPW1 had told him that he had no time and that the airway bill had indicated that it was going on a later flight. According to TPW1, the plaintiff was "jumping" and so TPW1 apologised to him for having to refuse him. TPW1 had also stated that he did not see the plaintiff after that nor did he see DW2.

Under cross-examination, TPW1 said he did not accept the parcel although a check of the cargo manifest of MH161 prepared by Mr. Sivam showed that it had been uplifted. He added that he could not have accepted the cargo in the situation the plaintiff came as the agent was not present.

It is necessary to review the evidence. Since it is not disputed, the Court accepts the fact that the plaintiff did go to the defendant's agent's office on 6 August 1979 in the morning to send some documents to London by air. Although DW2 had flicked through the documents, he was not able to say what they were and the Court is only left with the plaintiff's word that it is a manuscript entitled "The Theory of Flight", the result of three years' preparation based on his experiences as an airline pilot as

well as of his colleagues, and reading books, magazines and journals on the subject with the purpose of contributing and creating an impact in the aviation industry, to gain recognition and to share his experiences with others. The book, the plaintiff had said, was meant for school leavers interested in getting into a flying career, pilots and instructor pilots under training, and experienced pilots who have not had certain experiences.

The existence of the said manuscript is probable in the circumstances, although the plaintiff had no degree or diploma in aeronautical engineering, considering that he had obtained his commercial pilot's licence from the Government of Pakistan in 1971 valid from l9 May to 26 October of that year. Of course, the plaintiff had the tendency to be boastful, quite unnecessarily I might add, in the course of giving evidence by stating such things as he had done a General Management course at the "world renowned" Urwich Centre in Slough, Middlesex, that he had been trained by, and was the first Malaysian with, Pakistan International Airlines which was "Asia's largest airline then" and that he had piloted without licence "like the Duke of York". The fact that he did not bother and was not wise enough to make a photostat copy of an irreplaceable manuscript and that he had expected the London typesetters to decipher hundreds of pages of his handwriting are of course factors against his favour and against the probability of the existence of the said manuscript.

However, setting aside these considerations, what is the problem here is the fact that the defendant's agent with whom the plaintiff had alleged he had left the manuscript with had only corroborated his testimony as regards his coming to the office with the documents, the filling up of the airway bill and the payment of the RM305.17. As far as DW2 is concerned, the plaintiff had first taken all the documents with him, except the airway bill, to get the KPW3 form done and subsequently at around noon, he had come to take the airway bill as well.

DW2's version is supported by the evidence of TPW1 who had seen the plaintiff at the Ipoh airport just before the departure of Flight MH161 on 6 August 1979 attempting to send a parcel to England. Having considered the evidence, my finding is that DW2's story is the more probable of the two as, apart from the fact that the plaintiff had been seen by TPW1 in rather an agitated manner desperately trying to send the parcel to Kuala Lumpur *via* MH161 at past 1 p.m., the Customs declaration form ID2 is not of the same typewriter print as P1 although the plaintiff had alleged that DW2 had prepared both in his presence that morning. The entries in ID2 also support DW2's contention that he never prepared it especially so when the agent's box and the KPW3 box had not been filled and the details of the flight number and the airway bill number had been made in ink. A relevant feature is that the figures "125" for the flight number had been cancelled and replaced by "161" in the same handwriting, which DW2 had denied was his. If DW2 had typed ID2, surely the airway bill number would have been typed as well. This only indicates that ID2 had been prepared not by DW2. In any case as far as DW2 was concerned, the cargo was scheduled to be airlifted on MH125 later in the evening and not on MH161. As for the word "URGENT", DW2 had said it was on the plaintiff's instructions which ties in with TPWl's evidence that the plaintiff appeared to be in a great hurry to send the parcel.

With this finding that the manuscript was not sent through the defendant's agent, it follows that the defendant cannot be made liable for the loss. It also means that it was the plaintiff who had sent the manuscript himself at the airport on the earlier flight MH161 if it really was uplifted on that flight. Thus, when the parcel did not reach London, he had written officially to the defendant *vide* P4 for the attention of DW1 who had, on the plaintiff's communication of the details by telephone, sent P5 to the third party. It is pertinent to observe that in P4 what the plaintiff had stated was that the cargo had been sent based on the defendant's airway bill P1 but he did not state that it was sent through the defendant's agent. This is relevant to confirm the fact that he had sent it himself and not through DW2 using P1.

Further, the defendant in writing P5 only got the details of the third party's flight details through the plaintiff himself. They therefore did not know for a fact that it went up on MH161 and not MH125 as stated in P1. It is also relevant to note from P13 that all that the third party had told DW1 was that the consignment was still not traceable and that the third party's KL Cargo office had declared it as lost.

The fact that the manuscript had been uplifted on MH161 cannot actually be disputed by the third party as TPW1 himself had checked the aircargo transfer manifest for that flight and found that it was so. The only thing was that the acceptance of the said cargo was not by TPW1 himself but through some other employee of the third party purportedly the late Mr. Sivam. Accordingly, with the consignment missing, it can be argued that the third party should be held liable for the loss.

There is, however, no direct evidence that the parcel was ever uplifted on MH161. The only evidence from TPW1 was that it appeared on the manifest of that flight. There is no evidence that any of the third party's staff had attended to the plaintiff for that flight and had physically accepted the consignment for MH161. In any case, P13 only states that the consignment was still not traceable and therefore had been declared lost. It did not state that it was uplifted on MH161. There is also no contract between the plaintiff and the third party except through the defendant but since the plaintiff did not deliver the cargo to DW2, he had prevented the performance of the contract between the plaintiff and the defendant. Further, as far as the defendant was concerned, the cargo was to go on the later MH125 and not MH161. It was also the plaintiff who had told DW1 that it had gone on MH161 which only lends credence to the fact that he had taken all the relevant documents back from DW2 to send the parcel himself if he did send it at all.

With no concluded contract between the plaintiff and the defendant from only which the third party can be held liable, and with no other evidence how the cargo was included in the MH161 manifest with no other explanation how it got there in the first place considering that the manifest is to be prepared by the defendant and not the third party, my view was that the third party, who had not been sued by the plaintiff but had been brought in by the defendant, also cannot be held liable in the circumstances. In the event, I would dismiss the plaintiff's claim against the defendant with costs. I would also hold that the third party cannot be made liable in the circumstances and the plaintiff is to bear their costs.

Should I be held to be in error as regards liability, then the plaintiff is governed by the Carriage by Air Act 1974 and the relevant provision is Article 22(2)(a) of the Warsaw Convention which has been reproduced in the First Schedule to that Act. The said Article states:

> In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In this case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

Unfortunately for the plaintiff, despite the lengthy written submissions of his Counsel stating otherwise, my finding was that he had not paid the supplementary sum required and thus the limit of 250 francs per kilogramme, which by the Carriage by Air (Ringgit Equivalent) Order 1978 has been converted to forty-eight ringgit, will therefore apply. As the missing cargo only weighed two kilogrammes, the plaintiff is therefore entitled to ninety-six ringgit for the loss if the defendant or the third party is, or both of them are, found liable.

It is also fair to note that the amount of RM140,000 stated in P1 as the value of the manuscript had been calculated by the plaintiff himself based on RM140 per hour for the preparation period which took a thousand days of three to four hours a day. His calculation was therefore RM140 per day and not RM140 per hour. Not being able to look at the finished product by way of copy, it is quite impossible for the Court to assess the quality of the actual work produced. The value of the missing manuscript is of course of no consequence in the circumstances in view of the plaintiff failing to pay the supplementary sum required. There was also no evidence of the plaintiff's contract with any party for the publication of the manuscript entitling him to some form of compensation in this matter.

As has been stated earlier, based on the facts of this case, the plaintiff's claim is dismissed with costs against the defendant. The Court also finds the third party not liable and orders the plaintiff to bear the costs of the third party.